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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 JULIE BERG,

11 Plaintiff,

12 v.

13 NANCY A BERRYHILL, Deputy  
14 Commissioner of Social Security for  
Operations,

15 Defendant.

CASE NO. 3:17-CV-05611-DWC

ORDER ON DEFENDANT'S MOTION  
TO ALTER OR AMEND THE  
JUDGMENT PURSUANT TO FED. R.  
CIV. P. 59(E)

16 On February 7, 2018, the Court entered Judgment for Plaintiff, reversing and remanding  
17 Defendant's decision to deny Plaintiff's application for supplemental security income ("SSI"). *See*  
18 Dkt. 13, 14. Presently before the Court is Defendant's Motion to Alter the Judgment pursuant to  
19 Federal Rule of Civil Procedure 59(e) ("Motion").<sup>1</sup> Dkt. 15. Defendant argues the Court should  
20 alter the judgment and affirm Defendant's decision to deny benefits because the Court's decision is  
21 based on a clear error of law. *Id.* at 1.  
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24 <sup>1</sup> Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties  
have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 5.

1 The Court may alter or amend a judgment under Rule 59(e) where the Court has  
2 committed clear error. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Rule 59(e)  
3 provides an “extraordinary remedy, to be used sparingly in the interests of finality and  
4 conservation of judicial resources.” *Id.* (citation and internal quotation marks omitted).

5 Here, Defendant argues the Court committed clear error of law because the Court identified  
6 no objective medical evidence when determining the administrative law judge (“ALJ”) erred at  
7 Step Two regarding Plaintiff’s severe impairment of migraines. Dkt. 15, p. 2. Furthermore,  
8 Defendant argues the Court committed clear error by finding this error harmful, asserting any error  
9 at Step Two would be harmless because Step Two was decided in Plaintiff’s favor. *Id.* at 2-3.

10 Defendant’s arguments are unavailing. First, as the Court stated in its original Order, the  
11 objective medical evidence shows several acceptable medical sources diagnosed Plaintiff with  
12 migraines. *See, e.g.*, Dkt. 8, Administrative Record (“AR”) 280, 827, 829, 832, 864-65, 903. The  
13 medical evidence further reveals her migraines cause functional limitations which impact her  
14 ability to conduct basic work activities. *See, e.g.*, 53, 48, 213, 220, 222. Defendant asserts the  
15 Court erred by relying on Plaintiff’s complaints to her medical providers in determining whether  
16 the ALJ erred at Step Two. Dkt. 15, p. 2. However, an ALJ “is required to consider the  
17 claimant’s subjective symptoms, such as pain or fatigue, in determining severity” at Step Two.  
18 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing 20 C.F.R. § 404.1529(d)(2)).  
19 Therefore, Defendant’s first argument is unavailing.

20 Second, as the Court explained in its Order, the ALJ’s error at Step Two was not  
21 harmless. An ALJ’s error at Step Two is harmless if the ALJ accounts for all of Plaintiff’s  
22 limitations in assessing the residual functional capacity (“RFC”) assessment. *Lewis v. Astrue*,  
23 498 F.3d 909, 911 (9th Cir. 2007). Here, the ALJ only mentioned Plaintiff’s migraines twice –  
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1 once when summarizing Plaintiff's hearing testimony, and once when discounting medical  
2 opinion evidence from Dr. Dan Neim, Psy.D. *See* AR 25, 27. Nevertheless, the ALJ failed to  
3 discuss Plaintiff's migraine diagnoses or the limiting effects of her migraines in his decision. *See*  
4 AR 20-29. Because the ALJ failed to consider the limiting effects of Plaintiff's diagnosis, this  
5 error was not harmless, as the RFC was "incomplete, flawed, and not supported by substantial  
6 evidence." *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012) (internal quotation marks and  
7 citations omitted) ("Where the ALJ has found a severe medically determinable impairment at  
8 step two of the sequential analysis, all medically determinable impairments must be considered  
9 in the remaining steps of the sequential analysis.") Hence, Defendant's second argument is also  
10 unpersuasive.

11 Plaintiff requests the Court find Defendant made this Motion in bad faith and suggests the  
12 Court award Plaintiff attorney's fees as a result. Dkt. 16, p. 3 (citing *Barry v. Bowen*, 825 F.2d  
13 1324, 1333 (9th Cir. 1987)). While the Court declines to find Defendant acted in bad faith in  
14 filing this Motion, the Court notes Defendant's Motion resulted in an inefficient use of judicial  
15 resources and did not meet the standards of Rule 59(e). *See Carroll*, 342 F.3d at 944-45. Further,  
16 Plaintiff may raise any argument for attorney's fees in a separately filed motion for attorney's  
17 fees.

18 Defendant's Motion (Dkt. 15) is denied.

19 Dated this 27th day of March, 2018.

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22 David W. Christel  
23 United States Magistrate Judge  
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